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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1980

DUANE YOUNGBERG, *et al.*,
*Petitioners,*

v.

NICHOLAS ROMEO, AN INCOMPETENT, BY HIS MOTHER AND NEXT FRIEND, PAULA ROMEO,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF FOR RESPONDENT

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## QUESTIONS PRESENTED

1. Whether respondent, who has been involuntarily confined to a Pennsylvania institution for retarded persons, has a constitutional right to any or all of the following:
   (a) decent care;
   (b) reasonable protection from harm;
   (c) freedom from prolonged and unnecessary custodial shackling; and
   (d) minimally adequate habilitation.
2. Whether the court of appeals correctly ruled that a new trial is required because respondent's excluded expert testimony was relevant to the question whether any of those rights was violated.
3. Whether on this record petitioners are immune from suit as a matter of law.

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions listed by petitioners, Pa. Stat. Ann. tit. 50 §4406(b) provides:

> "If upon examination it is determined that such person is in need of care at a facility * * * [the court] may order the commitment of such person for care and treatment."

## STATEMENT OF THE CASE

1. For the first 26 years of his life respondent, an individual who is retarded, lived at home with his parents. During those years he attended a school for retarded persons, accompanied his family on various outings in the community, and lived a relatively ordinary life. (Tr. 1-31-38.) When his father died suddenly in May 1974, however, he became distressed and was temporarily hospitalized in Philadelphia.[1] In July 1974 a Pennsylvania court committed respondent to the Pennhurst State School and Hospital pursuant to the involuntary commitment provisions of Pa. Stat. Ann. tit. 50, §4406(b).

While at Pennhurst respondent suffered a series of injuries, some of them quite serious. (Pet. App. 5a.)[2] His mother, Mrs. Romeo, repeatedly attempted to improve his

---

[1]Although respondent was difficult to handle when he was first admitted to the hospital, hospital records show that during his 20-day stay there he "responded well to attention * * * was able to make his needs known and to learn a few small tasks of self care" and became "more calm and manageable." (Ex. D-12.)

[2]Respondent suffered no serious injuries during the 26 years he lived at home. (Tr. 2-121-28.)

situation at Pennhurst or to have him transferred.[3] When these efforts proved unsuccessful she instituted this § 1983 action for damages on his behalf, alleging that petitioners knew about but failed to protect respondent against the repeated injuries he suffered.

In late 1976 respondent was transferred from his ward to the Pennhurst Hospital for treatment for a broken arm suffered, according to Pennhurst records, when he was "being seated" by a staff member on his ward. (Ex. P-5, p. 77.) In December 1977, respondent's complaint was amended to state claims that petitioners had denied him adequate habilitation in the Hospital (where he remained) and had unnecessarily shackled him to a chair or a bed for long periods every day. That complaint (the Second Amended Complaint) alleged that petitioners had taken those actions maliciously. (Pet. App. 86a-92a.)[4]

2. Trial began on April 17, 1978 and lasted for eight days. Pennhurst records established that respondent had been

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[3]She testified that she visited her son at Pennhurst several times a month and that conditions on his ward were "horrifying." On those visits:

> "He was afraid. He would come to me. He was so glad to see me. He would hug me and just pull me away from the unit, from the ward." (Tr. 1-43.)

Mrs. Romeo contacted her community mental health/mental retardation center which directed correspondence to petitioner Youngberg expressing "serious concern" over respondent's treatment at Pennhurst. (A. 13a-14a.) She also contacted her ward leader and Congressman, at whose instance the Secretary of the Department of Public Welfare of Pennsylvania directed petitioners to "facilitate, to the extent possible" respondent's transfer to another facility. (A. 15a-16a.) Petitioners never initiated such a transfer.

[4]Petitioners are administrators (not medical doctors or psychologists) at Pennhurst. C. Duane Youngberg was then the Superintendent of Pennhurst. Richard Matthews was then Director of Resident Life and Marguerite Conley was the director of Ward 52, respondent's ward.

injured on 77 occasions. (Pltfs' Exh. P-5.) The injuries included a broken arm, a fractured finger, injuries to his sexual organs, bites, lacerations, scratches, and black eyes. (Pet. App. 5a.) Some of the injuries became infected from lack of treatment or by contact with feces that had not been cleaned from the ward. (*Id.*) A Pennhurst aide on his ward testified that other aides threatened and abused respondent, and that one had knocked him down in the shower and punched him repeatedly in the face. (Tr. 2-131-35.) It was not contested that petitioners were responsible for the safety of respondent while at Pennhurst (Pet. App. 6a, n.3), and the evidence showed that they were aware of some or all of his injuries. (*Id.* 5a.)[5]

The evidence also showed that, despite the availability of programs for respondent's ward and the Pennhurst staff's

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[5]Petitioner Conley testified that she read the accident reports (including those regarding respondent's injuries) on respondent's ward on a daily basis. (Tr. 5-177.) Petitioner Matthews testified that his department received reports of the more serious injuries (including reports regarding respondent's injuries). (Tr. 6-22-24.) Petitioner Youngberg testified that he had twice received correspondence from respondent's community mental health/mental retardation center expressing their "serious concern" over respondent's injuries (A. 13a-14a; Tr. 6-79-80), and that he visited respondent's ward "at least" once a month because it was "the only way the superintendent can really know whether services are being delivered * * *." (Tr. 6-149-51.)

Petitioner Conley testified that it was part of her job to ensure that residents received programming (Tr. 5-171-73) and to investigate abuse of residents. (Tr. 5-183.) Petitioner Matthews, Ms. Conley's supervisor, was responsible for seeing that residents had a safe environment and directed the operation of the ward teams that developed the programming of residents. (Tr. 6-17-21.) Petitioner Youngberg testified that he had overall responsibility for the operation of the institution. (Tr. 6-76.)

knowledge that programming reduces aggressive behavior,[6] most of respondent's time was spent, as one aide testified, simply sitting or lying on the floor. (Tr. 4-52, 4-95-96.)

Petitioners admitted that since the filing of his initial complaint they had shackled respondent to his bed or a chair for long periods each day for more than a year. (Tr. 2-130; Pet. App. 14a n.20.)[7] The restraints were not used as part of any habilitation or treatment program; rather, they were purely custodial (*i.e.*, having no training or habilitative purpose). (Tr. 7-66-67, 7-76, 7-82.)[8]

Petitioners also admitted that respondent had received no habilitation whatever for six months following the filing of his initial complaint. (Tr. 6-161-64.)[9] Petitioners did not

[6]"It is generally conceded that most, if not all, outbursts of violence by the retarded can be prevented by adequate programming." *Halderman v. Pennhurst State School & Hospital*, 446 F. Supp. 1295, 1308 (E.D. Pa. 1977), *aff'd in relevant part*, 612 F.2d 84 (3d Cir. 1979) (*en banc*), *reversed and remanded on other grounds*, 451 U.S. 1 (1981).

[7]Respondent had moved about freely for the twenty-six years that he lived at home with his family (Tr. 1-35-36) and restraints had rarely been used upon him at Pennhurst prior to the initiation of the lawsuit. (Tr. 4-188, 5-218.)

[8]The custodial shackling of Nicholas Romeo is consistent with the unchallenged finding of fact in *Halderman, supra*, that restraints are used at Pennhurst as "control measures" which are "potentially physically harmful" and "prevent residents from learning or exercising self-care skills." 446 F. Supp. at 1306-1307.

[9]Petitioners' contention that they were unable to treat respondent "because of his mother's objections" (Pet. Br. 4) is inaccurate. After respondent had been injured some three score times at Pennhurst, petitioners presented to Mrs. Romeo for her approval a single program that would have resulted in respondent's hands being restrained when his behavior was inappropriate. (N.T. 6-34.) Mrs. Romeo rejected the program, fearing that respondent would be unable to defend himself, a fear that petitioner Matthews testified was an "appropriate concern." (Tr. 6-35.)

contend that any of their actions resulted from inadequate staff or resources; on the contrary, they testified that staffing and resources were adequate (Tr. 6-21, 6-135-36, 5-173) and, indeed, blocked discovery on the matter, taking the position that budgetary matters "are not even remotely related to this lawsuit."[10]

3. The district court ruled that the "deliberate indifference to serious medical needs" standard of *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), governed this case and, on the basis of that ruling, excluded respondent's proffered expert testimony. That testimony would have shown *inter alia* that:

(1) the lack of treatment provided to the residents at Pennhurst was a direct cause of the violence on the ward in which respondent resided;

(2) the programs needed to prevent such violence were available at Pennhurst and not utilized;

(3) the prolonged use of shackles on respondent after the lawsuit began had no treatment purpose whatsoever, but was used for the convenience of staff;

(4) given the lack of activity on the wards, the residents of Pennhurst learned violent behavior as their only means of receiving staff attention;

(5) respondent's injuries were excessive and potentially mutilating, and that appropriate programming of the residents would have prevented much of the violence leading to respondent's injuries.

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[10]Defendants' Response to Plaintiff's Motion to Compel Production of Documents, dated August 24, 1977, p. 11. The trial court agreed with petitioners and on September 7, 1977 denied respondent's motion.

(Pet. App. 97a-104a.) The trial court also relied on *Estelle v. Gamble* in instructing the jury:

> "If you find that the defendants were deliberately indifferent to the medical and psychological needs of Nicholas Romeo, then you may find that plaintiff's 8th and 14th Amendment rights were violated.
>
> * * *
>
> "You are not to decide whether Nicholas could have been treated in some other fashion or whether it could have been done in some other way or better way. That is not the issue in this case.
>
> * * *
>
> "The mere fact that Nicholas was injured on one or more occasions does not permit you to draw the inference that the injury or injuries was caused by any of the defendants or that any of the defendants was deliberately indifferent."

(*Id.* 74a-75a.) On April 26, 1978 the jury returned a verdict for petitioners.

4. On November 24, 1980, the Third Circuit Court of Appeals, sitting *en banc,* unanimously vacated the district court judgment and remanded for a new trial. All nine judges of that court agreed that the district court had erred in its blanket exclusion of respondent's expert testimony and, following this Court's decision in *Bell v. Wolfish,* 441 U.S. 520 (1979), determined that the Eighth Amendment "deliberate indifference" standard should not be used to evaluate the rights of institutionalized retarded persons. (Pet. App. 6a-7a, 48a.)

Recognizing that any "specific instructions submitted to the jury" on remand "must be carefully structured to reflect the actual record that is developed," the majority then "set forth *** what may provide a beginning point for a set of jury instructions in a matter of this type." (*Id.* 41a.) The majority concluded that the "liberty" protected by the Due Process

Clause from arbitrary governmental deprivation includes a fundamental right to be free from physical restraints, but that that right could be overridden by a compelling reason making shackling necessary. (*Id.* 14a-21a, 46a.) The majority also ruled that respondent had a fundamental liberty interest in protection from assault and injury, but that that interest could be overridden if the conditions under which the injuries occurred were tolerated by the staff for a substantial reason (*e.g.*, that it was therapeutically important to have the residents mingling with each other rather than confined in isolation cells, even through the risk of injury might be increased). (*Id.* 21a-27a, 46a.) Finally, the majority concluded that respondent had a right to habilitation that was acceptable in light of present medical or other scientific knowledge. (*Id.* 38a-39a.)

The concurring judges agreed that respondent has protected rights to care and habilitation. (*Id.* 54a.) They proposed, however, that petitioners could be liable only if their conduct was "such a substantial departure from accepted professional judgment, practice, or standards in the care and treatment of this plaintiff as to demonstrate that the defendants did not base their conduct on a professional judgment"; that is, that "the choice in question was not a sham or otherwise illegitimate." (*Id.* 59a, 66a.)

## INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent's interest in this Court, as in the court of appeals, is to secure a new trial at which he will be permitted to adduce evidence from his expert witnesses showing a violation of his constitutional rights. The rights he asserts are the rights to minimally decent care, reasonable protection

from harm, freedom from unnecessary, purely custodial shackling, and minimally adequate habilitation. All nine court of appeals judges agreed that the Constitution generally affords such rights to retarded individuals who are involuntarily confined by the State. They disagreed over the precise definition of those rights, but their unanimous view was (a) that the evidence respondent sought but was not allowed to adduce was relevant to the question whether those rights had been violated, and (b) that the district court judgment must therefore be reversed and a new trial granted.

1. In Part IA below we show that retarded persons in the State's custody are constitutionally entitled to minimally decent care, both by virtue of the substantive protections of the Due Process Clause and by virtue, in this case, of a state-created liberty interest in care as a condition of confinement. In Part IB we show that minimally decent care must include reasonable protection from harm, and that respondent's right to personal security is independently protected by the Due Process Clause quite apart from its inclusion as an element of decent care. So far petitioners do not disagree: they concede that they must provide respondent care, including reasonable protection from harm.

This case involves prolonged shackling that is only "custodial," *i.e.*, shackling that has no medical or treatment or habilitative purposes whatever. Freedom from unnecessary, purely custodial shackling is also an element of minimally decent care, as we show in Part IC. It is, moreover, independently protected by the Constitution, for freedom from unnecessary bodily restraints lies at the core of the "liberty" safeguarded by the Due Process Clause. The States appearing as *amici* agree "that excessive and inappropriate use of physical restraints may constitute violations of their clients' " constitutional rights.

If the State does not provide minimally adequate habilitation to retarded persons who, while they are in the State's custody, have no one else to turn to for help, those persons are guaranteed not to attain the basic life skills the lack of which caused their confinement in the first place. Indeed, their ability even to retain the skills which they brought with them into the institution will be lost without habilitative efforts. In Part ID we show that a pattern of prolonged institutional neglect will inevitably work harm and is therefore inconsistent with the provision of minimally decent care. We also show that, apart from its inclusion in minimally decent care, minimally adequate habilitation is required by the Constitution of its own force. The Court need not decide that issue in this case, however, for the Pennsylvania statute pursuant to which respondent was committed creates a liberty interest in the continued provision of habilitation, just as it creates a protected liberty interest in continued care, that cannot be arbitrarily abrogated.

2. In Part II we show that, contrary to petitioners' contentions, it does not trivialize the Constitution to say that it takes cognizance of respondent's claims that he (a) suffered a pattern of over seventy injuries, many of them serious and some of them actually mutilating, (b) was simply tied up, to a bed or a chair, for most of his waking hours for over a year solely for the convenience of the staff, and (c) that he was denied minimally adequate habilitation for more than a year. We also show that respondent is not seeking to constitutionalize state torts. This is not a case in which state officials cause or permit liberty deprivations "in ways that are equally available to private citizens," *Parratt v. Taylor,* 49 U.S.L.W. 4509, 4515 (1981) (Powell, J., concurring), and respondent's claims, like prisoner com-

plaints under §1983 raising serious Eighth Amendment claims regarding conditions of confinement, cannot be turned away.

3. In Part III we discuss the standards of review appropriate to the constitutional claims at stake. We contend (a) that petitioners' tolerance of the conditions endangering respondent's personal security was unlawful unless it was reasonably related to their pursuit of the care or habilitation or protection of respondent or other residents; (b) that the imposition of purely custodial shackles on respondent for over a year was unlawful unless it was necessary (the standard required by federal regulations and by Pennsylvania state law and the one recognized by petitioners themselves); and (c) that respondent is entitled to minimally adequate habilitation.

We do not discuss the circumstances, if any, under which the "least restrictive alternative" principle applies to habilitation of retarded persons. That issue is not presented in this case. Respondent's claims in this case are not premised on a right to "least restrictive" habilitation or treatment. The court of appeals discussed the issue in connection with its *sua sponte* consideration of physically intrusive treatments like prefrontal lobotomies, which are no part of this case.

As Judge Aldisert noted below, there is wisdom in adhering to the common law tradition of case-by-case adjudication, tying rulings in individual cases to the facts of record and avoiding the unnecessary disposition of issues not squarely presented or not presented at all. That traditional approach is especially appropriate in this case. The Court will be unable at this intermediate stage to review the claims of the parties against the background of a full factual record. Not just the respondent's case will look different at a

trial at which his relevant proof is unrestricted: the defense will likely be adjusted in response. Moreover, the case raises sensitive issues of constitutional adjudication, issues that may arise in a variety of different factual and state-law settings. Accordingly, the invitations from petitioners and various *amici* to address issues that are not presented on this record should be declined lest the Court issue constitutional rulings on what are, in this case, only abstract questions.[11]

4. In Part IV we show that respondent's excluded evidence was relevant to his claims under any appropriate standard of review. Unless the Court disagrees with all of our contentions and holds that respondent could not on any set of facts under any standard of review establish a constitutional violation of any of the rights he has asserted, the judgment of the court of appeals granting respondent a new trial must be affirmed.

5. In Part V we show that petitioners are not entitled to immunity as a matter of law because neither the record of the trial below, at which respondent's evidence was wrongly excluded, nor the state of the law at the time their conduct occurred will support their claim.

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[11]Last Term, reflecting the approach we urge, this Court dismissed its writ of certiorari in *Minnick v. California Department of Corrections*, 49 U.S.L.W. 4609 (1981), declining to address constitutional issues in a case where the record contained ambiguities and the case was going back for further proceedings in the trial court. Similarly, in *Upjohn Co. v. United States*, 49 U.S.L.W. 4093 (1981), this Court said, "We are acutely aware * * * that we sit to decide concrete questions and not abstract propositions of law. We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area [concerning the scope of the attorney-client privilege in the corporate context], even were we able to do so." *Id.* 4093. See also *Hodel v. Virginia Surface Mining Ass'n*, 49 U.S.L.W. 4654 (1981), where the Court declined to pass on the constitutionality of a statute in the absence of "an actual factual setting that makes such a decision necessary." *Id.* 4662.

## ARGUMENT

### I.

### RESPONDENT IS ENTITLED TO DECENT CARE, REASONABLE PROTECTION FROM HARM, FREEDOM FROM UNNECESSARY CUSTODIAL SHACKLING, AND MINIMALLY ADEQUATE HABILITATION.

#### A. The State Must Afford Decent Care to Involuntarily Confined Retarded Persons.

It seems to us beyond dispute that the State owes a duty to afford minimally decent care to persons in its custody. That right to decent care arises directly under the Constitution itself and extends to all involuntarily confined persons, whatever the reason for their confinement. In addition, as we show below, in this case respondent enjoys a right to decent care by virtue of a state-created liberty interest that is protected against arbitrary abrogation by the Due Process Clause.

##### 1. The right to decent care arises directly under the Constitution.

The Cruel and Unusual Punishment Clause of the Eighth Amendment, which governs the prison conditions that may be imposed on persons convicted of crimes, "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency * * *.' " *Estelle v. Gamble,* 429 U.S.

97, 102 (1976) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)). Overcrowded conditions and an inadequate diet have been found to violate the Eighth Amendment, see *Hutto v. Finney*, 437 U.S. 678 (1978), and other conditions of confinement that result in "serious deprivations of basic human needs" or fall below "contemporary standards of decency," *Rhodes v. Chapman*, 49 U.S.L.W. 4677, 4679 & n.13 (1981), have also been "rightly * * * condemned" as unconstitutionally cruel and unusual. *Bell v. Wolfish*, 441 U.S. 520, 562 (1979).

If the Eighth Amendment mandates, in prisons, care consistent with the provision "of the minimal civilized measure of life's necessities," *Rhodes v. Chapman, supra*, 49 U.S.L.W. at 4679, the Due Process Clause, governing conditions in mental hospitals, can surely require no less.[12] The rights of convicts, imprisoned on account of knowing anti-social behavior, can be the same as, or less than, but never greater than, the rights of the retarded whose confinement comes about solely because of their innocent inability to care for themselves.[13]

In *Bell v. Wolfish, supra*, the Court held that, in evaluating conditions of pretrial detention implicating liberty interests under the Due Process Clause, "the proper inquiry

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[12]In *Ingraham v. Wright*, 430 U.S. 651 (1977), the Court declined to consider whether "persons involuntarily confined in mental or juvenile institutions can claim the protection of the Eighth Amendment" (*id.* 669 n.37), but the combination of that decision and the decision in *Bell v. Wolfish* seems to us, as it did to the court of appeals, to firmly establish that the Eighth Amendment applies only in cases concerning punishment of persons convicted of crimes. *Bell v. Wolfish*, 441 U.S. at 535 n.16; *Ingraham v. Wright*, 430 U.S. at 669-72 & n.40.

[13]See *Bell v. Wolfish, supra*, 441 U.S. at 545: "[P]retrial detainees, who have not been convicted of any crimes, retain *at least* those constitutional rights that we have held are enjoyed by convicted prisoners." (Emphasis added.)

is whether those conditions amount to punishment of the detainee." 441 U.S. at 535 (footnote omitted). In our view that standard is inadequate here. *Bell v. Wolfish* involved the rights of persons confined (a) upon a showing of probable cause that they had committed a federal offense, *id.* 536, and (b) in a prison with convicted inmates as well as other pretrial detainees. *Id.* 524. In reviewing the challenged conditions the Court refused to distinguish between pretrial detainees and convicted inmates, finding that both groups posed equal security risks and that "in certain circumstances [pretrial detainees may] present a greater risk to jail security and order." *Id.* 546 & n.28. The Court also noted that "[a] detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence." *Id.* 559. Furthermore, over eighty-five percent of the pretrial detainees were released within sixty days, *id.* 524-25 n.3: that short term of confinement played an important role in the Court's rulings. See *id.* 543, 555 n.35, 562. By contrast, retarded persons who are confined because they are unable to care for themselves are not suspected of crime, do not share quarters with convicted criminals where the smuggling of weapons and other contraband is a common occurrence, and often spend all or major portions of their lives in confinement.[14] Accordingly, their right to decent care should be measured more generously than the rights of the pretrial detainees in *Bell.*

Even if we are wrong, however, such that the sole due process liberty interest of an involuntarily confined retarded person is the "right to be free from punishment," *id.* 534, it is clear that the denial of decent care would amount to

[14]The average length of stay for residents at Pennhurst is 21 years. *Halderman, supra,* 446 F. Supp. at 302.

punishment and therefore violate due process. That is because there can be no legitimate interest justifying the denial of decent care. The denial would not be "reasonably related to a legitimate goal" and would therefore amount to "punishment that may not be constitutionally inflicted * * *." *Id.* 539; see *id.* 539 n.20.

### 2. The State has created a protected interest in decent care.

It is settled that state statutes can create liberty interests entitled to protection under the Due Process Clause. *Vitek v. Jones,* 445 U.S. 480, 488-89 (1980); *Wolff v. McDonnell,* 418 U.S. 539, 557-58 (1974). Confinement in a state facility for the retarded involves "a massive curtailment of liberty." *Humphrey v. Cady,* 405 U.S. 504, 509 (1972). Here, as the State's statute expressly provides, that confinement was for the purpose (among others, see *infra*) of providing respondent "care." (Pa. Stat. Ann. tit. 50 §4406(b).) The promise of care may be sufficient to justify an *initial* deprivation of liberty, but only the provision of care can thereafter justify the *continued* commitment. As the Court said in *Wolff v. McDonnell,* "[t]he touchstone of due process is protection of the individual against arbitrary action of government." 418 U.S. at 558. There can scarcely be anything more arbitrary than for the State to confine a person in order to afford him the care he cannot provide himself and then withhold that care. "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana,* 406 U.S. 715, 738 (1972); see *O'Connor v. Donaldson,* 422 U.S. 563 (1975).

The care mandated by the statute and, therefore, by the Due Process Clause, must be decent care. The State could not reasonably argue to the contrary, and petitioners do not: they concede that they owe a constitutional duty to plaintiff "to satisfy his basic needs for food, shelter, reasonable safety and medical care." (Pet. Br. 8; see *id.* 11, 12, n.10.) The States appearing as *amici* also recognize their duty to provide "food, shelter, supervision and care." (States *Amici* Br. 8.)

Thus the State owes a duty to the respondent, arising directly under the Due Process Clause as well as by virtue of a state-created liberty interest protected by the Constitution, to provide him decent care.

## B. Respondent Must Be Reasonably Protected From Harm.

### 1. Decent care includes reasonable protection from harm.

Whatever the full scope of a civilized concept of "decent care," in the context of involuntary confinement of persons unable to care for themselves it surely must include, at an irreducible minimum, the provision of living conditions that are reasonably safe, which in turn includes protection from repeated attacks from other residents. Petitioners agree: they concede that the State is under a constitutional duty to provide respondent "reasonable safety." (Pet. Br. 8, 11, 12, n.10.) The States appearing as *amici* also "acknowledge that they have a responsibility to protect their clients from harm." (States *Amici* Br. 8.)[15]

[15]When an institutionalized person who is not responsible for his actions engages frequently in self-destructive activities, protection from harm necessarily includes protection from self-inflicted harm.

### 2. There is an independent constitutional right to reasonable protection from harm.

Quite apart from its inclusion as an indispensable element of constitutionally required decent care, the right to personal security constitutes an "historic liberty interest" independently protected by the Due Process Clause. *Ingraham v. Wright,* 430 U.S. 651, 673 (1977). That right is not extinguished by the fact of lawful confinement. Even in the case of prisons, where "restrictive and even harsh" conditions "are part of the penalty that criminal offenders pay for their offenses against society," *Rhodes v. Chapman,* 49 U.S.L.W. at 4679, inmates are constitutionally entitled to reasonable protection from harm, including protection from their fellow inmates. See *Hutto v. Finney, supra* (affirming measures designed *inter alia* to protect prisoners from rampant violence).[16]

Similarly, "[t]here is no iron curtain drawn between the Constitution and the [mental institutions] of this country." *Wolff v. McDonnell, supra,* 418 U.S. at 555-56. Every lower federal court that has considered the question has determined that state officials who are responsible for

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[16]Cf. *Bell v. Wolfish, supra,* 441 U.S. at 547 (recognizing that prison officials "must be free to take appropriate action to ensure the safety of inmates"); *Wolff v. McDonnell, supra,* 418 U.S. at 566 (prison officials have "the responsibility for the safety of inmates and staff").

The lower courts have consistently held that prisoners have a constitutional right to be reasonably protected from harm at the hands of other prisoners. See, *e.g., Jones v. Diamond,* 636 F.2d 1364, 1372-74 (5th Cir. 1981) (*en banc*); *Withers v. Levine,* 615 F.2d 158 (4th Cir. 1980); *Woodhous v. Virginia,* 487 F.2d 889 (4th Cir. 1973); *Holt v. Sarver,* 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd,* 442 F.2d 304 (8th Cir. 1971), *aff'd sub nom. Hutto v. Finney, supra; Roberts v. Williams,* 302 F. Supp. 972 (N.D. Miss. 1969), *aff'd in relevant part, remanded in part,* 456 F.2d 819 (5th Cir. 1971).

operating institutions for the retarded or mentally ill have a constitutionally imposed duty to safeguard the personal security of involuntarily committed residents.[17]

Thus, respondent is entitled to reasonable protection from harm, both because that right is subsumed in his right to decent care and because it is independently recognized by the Due Process Clause.[18]

### C. Respondent Must Be Free of Unnecessary Custodial Shackling.

#### 1. Decent care includes the right to freedom from unnecessary custodial shackling.

The responsible use of restraints may form part of a reasonable professional program of habilitation. This case,

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[17]See, *e.g.*, *Rogers v. Okin*, 634 F.2d 650, 655-56 (1st Cir.), *cert. granted*, 101 S.Ct. 1972 (1980); *Goodman v. Parwatikar*, 570 F.2d 801, 804 (8th Cir. 1978) (residents have "a constitutional right to a humane and safe living environment * * * which includes a duty to protect inmates from assault by fellow inmates and staff"); *Spence v. Staras*, 507 F.2d 554, 557 (7th Cir. 1974) (mental patient's 14th Amendment right to personal security imposes duty on defendants "to protect him from attack by fellow inmates"); *Halderman v. Pennhurst State School & Hospital, supra; Knight v. Colorado*, 496 F. Supp. 779, 780 (D. Colo. 1980); *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in relevant part, vacated and remanded in part*, 550 F.2d 1122 (8th Cir. 1977); *New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752 (E.D. N.Y. 1973); cf. *Harper v. Cserr*, 544 F.2d 1121, 1122-1124 (1st Cir. 1976).

[18]Here again we believe that the *Bell v. Wolfish* standard, protecting pretrial detainees' Due Process liberty interests only against conditions that amount to punishment is (a) insufficient but is (b) satisfied anyway, since the State can have no legitimate interest that would justify denying involuntarily committed retarded persons reasonable protection from attack by other residents. Hence such denial does amount to punishment under the *Bell* test.

however, raises no issue regarding the use of restraints for treatment or habilitation purposes.[19] Rather, it involves only "custodial" shackling imposed, according to respondent, solely for the convenience of the staff. Prolonged custodial shackling that is unnecessary is simply stark abuse and cannot be squared with any definition of minimally decent care. The *amici* States acknowledge "that excessive and inappropriate use of physical restraints may constitute violations of their clients' " constitutional rights. (States *Amici* Br. 8, 29.)

### 2. There is an independent constitutional right to freedom from unnecessary custodial shackling.

Apart from its inclusion in the right to minimally decent care, respondent's right to freedom from unnecessary custodial shackling is part of any citizen's liberty interest, independently protected by the Due Process Clause, in freedom from unreasonable physical restraint. See *Parham v. J.R.*, 442 U.S. 584, 600-01 (1979); *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977). Indeed, freedom from bodily restraint is the presumptive starting point in any analysis of the content of protected liberty. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Meyer v. Nebraska*, 262 U.S. 390,

[19] Petitioners admitted in their answer that for more than a year they "had caused [respondent] to be shackled to his bed or otherwise physically restrained for long periods of time each day." See paragraph 22 of petitioner's Second Amended Answer (A. 9a), admitting paragraph 22 of the Second Amended Complaint. (Pet. App. 89a.) At trial their witnesses testified that the shackling was not part of any habilitative program but was imposed for purely custodial reasons (Tr. 7-66-67, 7-76, 7-82); and petitioners have never, at any stage of this litigation, contended otherwise.

399 (1923); *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). That is because "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action" and is a "fundamental liberty." *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 18-19 (1979) (opinion of Powell, J.).[20]

Having been involuntarily but lawfully institutionalized, respondent inevitably suffered some constitutionally permissible restrictions on his freedom of movement. His right to freedom from restraint was limited by the purposes for which he was confined and was "subject to restrictions imposed by the nature of the regime to which [he was] lawfully committed." *Wolff v. McDonnell, supra*, 418 U.S. at 556. But not all of respondent's liberties were left at the institution's gates. A continuous practice of prolonged and unnecesary custodial shackling is no less oppressive than the excessive condition of isolation barred by the Eighth Amendment (cf. *Hutto v. Finney, supra*), and the Due Process Clause cannot reasonably be said to permit what the Eighth Amendment would not.

Hence, both because it is inconsistent with their right to minimally decent care and because it violates their fundamental liberty interest in freedom from unnecessary custodial restraints, confined retarded persons are constitu-

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[20]Thus petitioners err in arguing that "[i]n creating a constitutional right to be free of restraints or shackles, the Third Circuit broke totally new ground." (Pet. Br. 27 (footnote omitted).)

tionally protected against being lashed to their beds simply because they are less trouble that way.[21]

### D. Respondent Must Be Afforded Minimally Adequate Habilitation.

#### 1. Decent care of the retarded includes minimally adequate habilitation.

We have shown above that the right to decent care of persons confined by the State includes the right to be protected from harm and to be free of prolonged and unnecessary custodial restraints such as shackles. The correlative duties associated with those rights, we believe, are owed to anyone whom the State would confine. In the case of retarded persons, however, the provision of minimally decent care must also include the provision of minimally adequate habilitative efforts. The reason is that, without habilitation, institutionalized retarded persons will suffer harm (both physical and psychological) that the State is under a duty to prevent as part of its obligation to provide minimally decent care.

The denial of habilitation results in harm to retarded persons in several ways. First, the denial of habilitative

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[21]Assuming once more that the *Bell* "punishment" test applies, it is satisfied by purely custodial shackling for over a year solely for the convenience of staff: the State can have no legitimate interest justifying that kind of shackling for that duration. Cf. *Bell v. Wolfish, supra,* 441 U.S. at 539 n.20: "[L]oading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish."

training to persons who have been committed because of their inability to care for themselves will inevitably prolong their commitment, perhaps unnecessarily turning a short-term confinement into a life-long one. Second, without adequate programming, left with nothing to do all day, some retarded persons are likely to engage in self-destructive behavior and aggression towards other residents.[22] That is the thrust of part of the expert testimony that plaintiff sought to offer at trial. The State cannot confine retarded persons on the premise of affording them decent care and then simply warehouse them in conditions so barren of constructive stimuli that only aggressive and/or self-destructive behavior is rewarded.

Third, it is well documented that without minimal habilitative efforts—basic training in fundamental life skills—institutionalized retarded persons not only will fail to develop such skills independently but also will lose the skills they may have brought with them into the institution.[23] The resulting inability to deal with life's basic tasks will inevitably lead to a variety of inappropriate, aggressive and self-destructive behaviors. Indeed, putting aside increased risks of physical harm, if a retarded individual loses all of his

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[22]That is especially true in the case of persons who have been confined because of their tendency towards violent behavior: the absence of habilitation will reinforce rather than ameliorate that tendency, potentially or actually endangering other residents.

[23]See, *e.g.*, Mitchell & Smeriglio, *Growth in Social Competence in Institutionalized Mentally Retarded Children*, 74 Am. J. Mental Deficiency 666 (1970); Vogel, *Effects of Environmental Enrichment and Environmental Deprivation on Cognitive Functioning in Institutionalized Retardates*, 31 J. Consulting Psych. 570 (1967); Guthrie, Butter, & Gorton, *Personality Differences Between Institutionalized and Non-institutionalized Retardates*, 67 Am. J. Mental Deficiency 543 (1963); see also *Halderman, supra*, 446 F. Supp. at 1322.

previously acquired skills through prolonged institutional neglect, then the State has worked positive injury, in violation of its duty to provide decent care. In our view it would plainly violate the Constitution for the State to quarantine a population afflicted by an infectious disease and then deny treatment, permitting the disease to worsen. It is the same with confinement of retarded persons. Once they have been confined they have no one but the State to turn to for help in gaining additional skills or, at least, preserving whatever skills and abilities they have.

The Constitution does not ask miracles of the State and neither do we. But without provision of minimally adequate habilitation, the State knowingly visits positive harm on confined retarded individuals that the Constitution must be deemed to prohibit.[24]

### 2. There is an independent constitutional right to minimally adequate habilitation.

Quite apart from its relationship to decent care, a right to habilitation arises directly under the Constitution and by virtue, in this case, of a state-created right that is protected under the Due Process Clause.

#### a. The right to habilitation arises directly under the Constitution.

The *amicus* briefs of the American Orthopsychiatric Association *et al.* and the American Psychiatric Associa-

[24]Since the State can have no legitimate interest warranting the infliction of harm on a retarded person by the denial of minimally adequate habilitation, the *Bell v. Wolfish* punishment standard (assuming it is all that applies) is satisfied.

tion fully set forth the reasons why retarded persons have a residual, constitutional liberty interest in receiving minimally adequate habilitation following involuntary confinement. We agree with their views on that issue and will not repeat them here. Only one contention made by petitioners and the *amici* States warrants comment.

Petitioners argue (Pet. Br. 19) that the State has legitimate interests in

> "provision of care or treatment, protection of other residents, and persons in the facility, and efficient and economical operation of the institution. So long as the conditions of confinement are reasonably related to *any* of these objectives * * * no substantive due process violation has occurred." (Emphasis added.)

That argument fails to address at all whether respondent has a constitutional right to minimally adequate habilitation.[25] It also leads to the conclusion that the State could choose to maintain conditions reasonably related to the objective of providing treatment and thereby extinguish a resident's right to decent care. It may be that states are generally free to "deal with one problem at a time" (Pet. Br. 18), but it does not follow that if the State respects a constitutional right to decent care (which, in any event, in this case it did not) it can treat residents' other constitutional rights as "problems" to be dealt with another day. It must respect *all* constitutional rights of persons in its custody.

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[25]The *amici* States make the same argument at pages 18-20 of their brief.

In short, if respondent has no right to habilitation it is because he has no right to habilitation, not because he has some other right that the State does not infringe.[26]

### b. The State has created a protected interest in habilitation.

The Court need not decide in this case whether a right to habilitation is guaranteed by the Constitution of its own force. That is because, in this case, there is a state statute that creates a liberty interest in habilitation that is protected by the Due Process Clause from arbitrary abrogation.

We showed above that, the State having committed respondent for the statutorily expressed purpose of providing him care, it could not justify a continued confinement without providing that care: the state statute created a valid liberty interest in the expectation of care which the State may not thereafter arbitrarily abridge. See *Vitek v. Jones, supra; Wolff v. McDonnell, supra; O'Connor v. Donaldson, supra* (when the State confines a person for a stated purpose it must fulfill that purpose); *Jackson v. Indiana, supra.* Petitioners do not contest that view. (Pet. Br. 17-18.) It is the same with habilitation under the Pennsylvania statute pursuant to which respondent was committed (the

[26]Petitioners' and the *amici* States' briefs contain suggestions that the Court should not recognize a constitutional right to minimally adequate habilitation because the condition of being retarded cannot be "cured." (Pet. Br. 17, States *Amici* Br. 3-5.) The professional associations that have appeared as *amici* in this case sharply disagree with that suggestion, and we can perceive no reason why the right to minimally adequate habilitation should depend upon the prospect of a cure rather than amelioration of the disabilities of retardation. In any event, it *is* certain that retarded persons will not gain or even maintain life's basic skills if they are warehoused and ignored.

Mental Health and Retardation Act of 1966, Pa. Stat. Ann. tit. 50 § § 4401 *et seq.*).

That statute provides in relevant part as follows (*id.* § 4406):

> (a) Whenever a person is believed to be mentally disabled, and in need of care or treatment * * * a petition may be presented to the court of common pleas * * * for his immediate examination or commitment to an appropriate facility for examination, observation and diagnosis.
>
> (b) If, upon examination, it is determined that such person is in need of care at a facility * * * [the court] may order the commitment of such person for care and treatment.

Petitioners cite only subsection (a) of the statute in support of their argument that the retarded can be committed in Pennsylvania for either care *or* treatment. But the important language is found in subsection (b), which provides that actual commitment for purposes other than the initial examination shall be for the purpose of "care *and* treatment" (emphasis added).[27]

[27]Beyond that, other provisions of the 1966 Act (a) make it the State's duty "[t]o assure * * * the availability and equitable provision of adequate mental health and mental retardation services" (§ 4201); (b) impose on the counties the duty to establish a "mental retardation program * * * for the diagnosis, care, treatment, rehabilitation and detention of the mentally disabled" (§ 4301(a)); (c) provide for voluntary admissions to state facilities "for examination, treatment and care" (§ § 4402, 4403); and (d) place directors of facilities "in charge of the diagnosis, treatment and care" of residents, unless the director is not a physician, in which case a physician should be in charge "of all medical diagnosis, treatment and care to be rendered to such persons" (§ 4417(a)). In the exercise of his rulemaking powers under § 4301 of the Act, the Secretary of Welfare promulgated a regulation stating that the county programs are "the means by which minimum services as described in the act shall be readily available to promote the social, personal, physical and economical habilitation or rehabilitation of mentally retarded person[s] * * *." See *In re Schmidt*, 429 A.2d 631, 636 (Pa. 1981).

Nor do petitioners mention the state and federal court decisions that have demonstrated that the 1966 Act confers a right to habilitation. In *In re Joyce Z.*, No. 2035-69 (Pa. Com. Pl. Ct. Allegheny Cty. 1969), the court ruled that there is "a right to treatment given * * * by the" Act.[28] In *In re Schmidt,* 429 A.2d 631, 636 (Pa. 1981), the Pennsylvania Supreme Court made clear that the Act had adopted a principle of "normalization" (the concept that retarded persons are entitled "to live a life as close as possible to that which is typical for the general population"), and therefore required "that the least restriction consistent with adequate treatment and required care shall be employed," a requirement implemented by providing "minimum services" including services to "promote the social, personal, physical and economic habilitation and rehabilitation of mentally retarded person[s] * * *."

The federal courts are unanimous in holding that the 1966 Act confers a right to treatment. Both the majority and concurring opinions below so hold. (Pet. App. 34a-35a, 55a.) So do *Eubanks v. Clarke,* 434 F. Supp. 1022, 1026-27 (E.D. Pa. 1977) (Lord, C.J.), and *Halderman, supra,* 446 F. Supp. at 1322-23.[29] A long line of this Court's cases

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[28]See also *In re Guzman,* 45 Pa. Cmwlth. 525, 405 A.2d 1036, 1038 (1979) ("[W]hen the state involuntarily commits retarded persons it must provide 'minimally adequate habilitation.' ") (Inner citation omitted.) (It is unclear whether that was a state statutory or a constitutional ruling.)

[29]The legislative history of the Act firmly supports those holdings. Senator Pechan, the principal sponsor of the Act, stated when he introduced the bill:

> "The object of this legislation is to make it possible for every mentally disabled person to receive the kind of treatment he needs, when and where he needs it. * * * It will make available the services of psychiatrists and psychologists, of psychiatric nurses and social

*(continued)*

teaches that this consistent view of the local federal courts regarding a matter of state law warrants "great deference" and should be accepted by this Court.[30]

It follows that petitioners are simply incorrect in arguing that the state statute does not create a right to habilitation as well as to decent care. That state-created guarantee of habilitation constitutes a liberty interest that is entitled to the protection of the Due Process Clause "to insure that the state-created right is not arbitrarily abrogated." *Wolff v. McDonnell, supra,* 418 U.S. at 557. Having committed respondent for the legitimate purpose of affording him habilitation the State may not, consistent with due process, continue that confinement while at the same time arbitrarily denying the habilitation guaranteed by the statute.[31] See *Jackson v. Indiana, supra; O'Connor v. Donaldson, supra.*

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*(footnote continued from preceding page)*

> workers, of specially trained occupational therapists, of speech and hearing therapists, of activities directors and child care workers. It will supplement the benefits of therapy with daytime and evening programs of activity * * *.
>
> "* * * We are not about to close our State schools and hospitals or our State mental hospitals. The great point is that we shall know that the treatment of one of these institutions is the indicated treatment before the patient leaves his community. * * *."

Pa. Legislative Journal, p. 76 (September 27, 1966).

[30] *Huddleston v. Dwyer,* 322 U.S. 232, 237 (1944). *Accord, Rummell v. Estelle,* 445 U.S. 263, 267 n.7 (1980); *Bishop v. Wood,* 426 U.S. 341, 346 & n.10 (1976); *United States v. Durham Lumber Co.,* 363 U.S. 522, 526-27 (1976); *Estate of Spiegel v. Comm'r,* 355 U.S. 701, 708 (1949); *Propper v. Clark,* 337 U.S. 472, 486-487 (1949); *Township of Hillsborough v. Cromwell,* 326 U.S. 620, 629-30 (1946); *MacGregor v. Mutual Life Assurance Co.,* 315 U.S. 280, 281 (1942).

[31] That habilitation must be minimally adequate, just as the care owed by the State must be minimally decent care.

Thus there is no need for the Court in this case to decide whether the Constitution of its own force and without regard to state statutory law entitles retarded persons to minimally adequate habilitation when confined in state institutions.

## II.

## RESPONDENT'S ALLEGATIONS STATE CONSTITUTIONAL CLAIMS.

We recognize that constitutional violations do not occur every time an institutionalized person is injured or restrained. "There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned." *Ingraham v. Wright,* 430 U.S. at 674, quoted in *Bell v. Wolfish,* 441 U.S. at 539 n.21. See *Knight v. Colorado, supra* (holding that an isolated incident causing no harm to a mentally ill resident did not amount to a constitutional wrong). Similarly, short-term or intermittent denials of minimally adequate care or habilitation may rise only to the "*de minimis* level" and not be actionable.

But whatever the contour of the line setting off the trivial from the serious, this case falls on the side of constitutionally respected claims. Respondent's allegations and such evidence as he was allowed to adduce at trial show (a) a pattern of some seventy injuries, several of them extremely serious and many of them potentially or actually mutilating, that occurred during a relatively short period and

that were known to petitioners;[32] (b) that he was shackled to a bed or chair for up to twelve hours every day for more than a year for no reason other than the convenience of the staff; and (c) that he was denied minimally adequate habilitation for a period of years. It does no disservice to the Constitution to say that it takes cognizance of claims of abridged liberty so serious as these.

Petitioners are incorrect in suggesting (Pet. Br. 13-14) that in bringing this case respondent asks the courts to engage in impermissible second guessing of hospital administrators. There is nothing "baffling" (*id.*) about a claim that the State may neither take a retarded person into its custody for provision of decent care and then turn its back on him while he suffers a prolonged pattern of serious injuries, nor shackle him to a bed or a chair and ignore him for long periods, day after day. Moreover, "[c]ourts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties," *Pell v. Procunier*, 417 U.S. 817, 827 (1974), and "a policy of judicial restraint," such as that urged by petitioners, "cannot encompass any failure to take cognizance of valid constitutional claims * * * arising in a * * * state institution," for "federal courts will discharge their duty to protect constitutional rights." *Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974).

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[32]Petitioners mischaracterize the decision of the court of appeals in stating (Pet. Br. 19) that it "clearly established a constitutional cause of action for nearly any personal injury which may occur in a state mental institution." On the contrary, the court of appeals rightly recognized the *de minimis* limitation—and that respondent's allegations and proof surmounted it. The court held (Pet. App. 23):

> "The right to protection is not activated by an isolated mishap, or called into question by each bruise that a patient may suffer. But a pattern of attacks, injuries or violent behavior such as we have here would create a claim to such a right."

Respondent's claim to minimally adequate habilitation is no more mysterious. This Court has stated that "[w]here 'treatment' is the sole ground asserted for depriving a person of liberty, it is plainly unacceptable to suggest that the courts are powerless to determine whether the asserted ground is present," *O'Connor v. Donaldson, supra,* 442 U.S. at 574 n.10, and that "[t]he medical nature of [an] inquiry * * * does not justify dispensing with due process requirements." *Vitek v. Jones, supra,* 445 U.S. at 495. It is no more difficult—and no less necessary—for a court to determine whether minimally adequate habilitation exists than to determine whether any habilitation whatever is present: indeed, habilitation that is not minimally adequate is not habilitation at all.

Nor, contrary to petitioners' claim, does respondent seek to constitutionalize what would otherwise be run-of-the-mill state torts. An analysis of that claim must start from the premise that "[i]t is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe v. Pape,* 365 U.S. 167, 183 (1961).

Beyond that, the decisions of this Court cited by petitioners (Pet. Br. 13-14) in support of the notion that the existence of state remedies can satisfy a constitutional due process requirement are inapplicable to this case. In *Ingraham v. Wright* the Court ruled that state protections were adequate to protect school children from wrongful corporal punishment in public schools. That case, however, turned on the openness of the public school environment and the traditional common law privilege of teachers to administer corporal punishment to their students. The closed environment of the mental institution contrasts sharply with

the open public school setting, and there is no analogous privilege permitting hospital administrators to fail to protect residents, or unnecessarily shackle them, or deny them minimally adequate habilitation. Moreover, the case did not address any issue of substantive due process involved here. See 430 U.S. at 689 n.5 (White, J., dissenting).

In *Parratt v. Taylor*, 49 U.S.L.W. 4509 (1981), the Court ruled that the prison inmate's protected property interest had been abridged, but not without due process. The negligent loss of the inmate's "hobby materials" had occurred "as a result of a random and unauthorized act by a state employee" rather than any state practice or policy, *id.* at 4512, and the availability of post-deprivation state remedies was held sufficient to satisfy the requirements of procedural due process. Our case involves not an accidental and unauthorized abridgement of a minor property interest but knowing and prolonged denials of substantial liberty interests.[33] Nothing in *Parratt* closes the federal courts to such claims.

In sum, given the institutional setting and the gravity of respondent's claims, *Ingraham* and *Parratt* are inapplicable here.[34] This is not a common law tort case in which state officials cause or permit liberty deprivations "in ways that

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[33]See the concurring opinions of Justices White and Blackmun, stating that the rationale of *Parratt* would not apply to intrusions on liberty interests. 49 U.S.L.W. at 4513-14.

[34]In contrast to *Ingraham* and *Parratt*, which found that constitutional liberty and property interests existed but were adequately protected by state remedies, *Paul v. Davis*, 424 U.S. 693 (1976), cited by petitioners (Pet. Br. 13-14), did not hold that the availability of state remedies can defeat a constitutional claim: it held that the respondent claimed no liberty or property rights secured against state deprivation in the first place.

are equally available to private citizens." *Parratt*, 49 U.S.L.W. at 4515 (Powell, J., concurring). Prisoner complaints under §1983 raising serious Eighth Amendment claims regarding the conditions under which they are imprisoned are not turned away; it can be no different for the claims of retarded persons under the Due Process Clause. Respondent's claims are not *de minimis*, do not trivialize the Constitution, and cannot be defeated by the uncertain availability of state law remedies.[35]

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[35]The existence of adequate state remedies in this case is at best uncertain. Petitioners assert (Pet. Br. 13) that *Freach v. Shovlin*, 471 Pa. 583, 370 A.2d 1163 (1977), gave respondent a private right of action under Pennsylvania's Mental Health and Mental Retardation Act of 1966, *supra*. *Freach*, however, simply held that, in an ordinary wrongful death and survival action brought by the parents of two children killed by a former mental patient who, it was alleged, should not have been released from custody, §603 of the Act replaced absolute immunity for officials holding positions like petitioner Youngberg with a qualified immunity that excluded gross negligence, incompetence, or actions that are intentional, malicious, wanton, or reckless. The case does not even mention a possible cause of action under the Act, and even in the context of ordinary tort actions articulates an immunity standard that may prohibit claims that the objective prong of §1983's qualified immunity, see *Wood v. Strickland*, 420 U.S. 308 (1975), would not (*i.e.*, those where the official should have known, but did not know, that his actions were wrongful).

Nor does respondent have a remedy directly against the State. At the time respondent filed his suit, Pennsylvania was immune by virtue of sovereign immunity. *Freach v. Shovlin*, *supra*. The Pennsylvania Supreme Court later abrogated the doctrine of sovereign immunity, *Mayle v. Pennsylvania Dept. of Highways*, 479 Pa. 384, 388 A.2d 709 (1978), but not until after the trial in this case was completed. Respondent cannot now file a claim against Pennsylvania in state court because the statute of limitations has run. *Leasoff v. Commonwealth*, 428 A.2d 783 (Pa. 1981); *Royal-Globe Ins. Co. v. Hauck Mfg. Co.*, 233 Pa. Super. 248, 335 A.2d 460 (1975). The Pennsylvania legislature has now re-established sovereign immunity in Pennsylvania with limited exceptions. Pa. Stat. Ann. tit. 42 §§8521, 8522. Even assuming that one of those exceptions might be otherwise applicable to the facts of this case, *but see Steinberg v. Commonwealth*, 46 Pa. Cmwlth. 105, 405 A.2d 1135 (1979), the statute of limitations would nevertheless bar a suit by respondent against the State.

## III.

## STANDARDS OF REVIEW.

We have shown above that retarded persons in state institutions are entitled to reasonable protection from harm, freedom from prolonged unnecessary custodial shackling, and minimally adequate habilitation, both because those entitlements are part of the decent care owed by the State and because they are independently protected liberty interests under the Constitution. Here we discuss the appropriate standards for review of respondent's claims.

"Constitutional adjudication being a matter of 'great gravity and delicacy,' " *Kremens v. Bartley*, 431 U.S. 119, 128 (1977) (quoting *Ashwander v. TVA*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring)), there is a "long-established rule that this Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " 431 U.S. at 136, quoting *Liverpool, N.Y. & P.S.S. Co. v. Commissioner of Emigration*, 113 U.S. 33, 39 (1885). That long established rule has special relevance here, where petitioners and *amici* seek rulings on issues—most notably issues regarding the "least restrictive alternative" theory in connection with treatment or habilitation programs—that on the facts of this case are not raised and need not be reached. Moreover, as we show *infra*, the selection of any particular standard of review from among the alternatives that seem reasonably worthy of consideration will not change the result in this Court, for under any of them respondent's excluded evidence was relevant and a new trial is required.

**A. Reasonable Protection Against Harm.**

1. Two standards governing the constitutional duty of care owed to prisoners have been enunciated by this Court. In *Rhodes v. Chapman,* 49 U.S.L.W. at 4679, the Court held that the Constitution forbids "the wanton and unnecessary infliction of pain."[36] In *Estelle v. Gamble,* 429 U.S. at 104, the Court held that the Constitution forbids "deliberate indifference to serious medical needs of prisoners."[37] Neither standard is adequate here, for the same reasons.

First, both are standards established under the Cruel and Unusual Punishment Clause of the Eighth Amendment, and this Court has held that that Clause applies only in cases of punitive incarceration for criminal acts. *Bell v. Wolfish,* 441 U.S. at 535 n.16; *Ingraham v. Wright,* 430 U.S. at 669-72 & n.40.

Second, the rationale behind imprisonment and the prison environment are markedly different from the rationale behind confinement of retarded persons and the environment of mental institutions. It cannot be said that the State owes to innocent individuals who are involuntarily confined solely because of their inability to care for themselves only that duty of care it owes to individuals imprisoned for the purpose (among others) of punishment for crimes against society. Just as "[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts

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[36] *Rhodes v. Chapman* did not announce but reiterated that standard, citing *Gregg v. Georgia,* 428 U.S. 153, 173 (1976) (joint opinion), and *Estelle v. Gamble,* 429 U.S. at 103.

[37] The "deliberate indifference" instruction was given by the district court in this case and is favored by the *amici* States (States *Amici* Br. 29-30).

of criminal conviction and incarceration," *Ingraham v. Wright*, 430 U.S. at 669, so do the helpless retarded stand in different circumstances from "those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so." *Wolff v. McDonnell*, 418 U.S. at 561. The retarded are the misfortunate, not the malevolent.

As the concurring opinion below pointed out (Pet. App. 56a, 59a), the State has an *affirmative duty* to discover and respond to the needs of confined retarded persons who are unable to care for themselves, a duty greater in kind, in our view, than it owes to convicted prisoners. Moreover, the very nature of the prison population, comprised of the deliberately lawless, many of whom "are recidivists who have repeatedly employed illegal and often very violent means to attain their ends," *Wolff v. McDonnell*, 418 U.S. at 561-62, may justify a level of personal security that need not be tolerated in an institution for the retarded, of whom the same things cannot be said. It follows, in our view, that the appropriate definition of the constitutional right to care must impose a higher duty in the case of institutions for the retarded than in the case of prisons.

2. The court of appeals ruled that, if the respondent suffered repeated injuries of which petitioners were aware, then petitioners could be held liable unless their actions were justified by "substantial necessity" or, stated differently, "important state interests" or "substantial explanations." (Pet. App. 25a-26a, 46a.) Petitioners contend that they should be held liable only if their conduct was not "reasonably related to legitimate state interests." (Pet. Br. 32; see also *id.* at 9, 15, 18-19.) In fact, however, the court of appeals and petitioners (and respondent) agree (with one exception discussed below) on the state interests that can be asserted, with the result that it makes no difference whether those interests are called "substantial" or simply "legitimate."

The court of appeals stated, in formulating proposed jury instructions, that:

> "For example, if the staff considered it important, for therapeutic purposes, to have the resident mingling with others instead of confined to an isolated cell, even though some risk of injury existed, you may consider that to be a substantial explanation." (Pet App. 46a.)

What the court of appeals called a "substantial" interest is thus for all practical purposes the same as what petitioners call their "legitimate" interests in providing "care or treatment, protection of the person, [and] protection of other residents and persons in the facility * * *." (Pet. Br. 19.)[38] We agree that, whether the "substantial" or "legitimate" rubric is employed, it would be a defense if petitioners' conduct was reasonably related to the State's interest in providing care and habilitation and the institutional order needed to provide that care and habilitation.[39]

[38]The court of appeals did not address whether the State's interest in protecting residents qualified as a "substantial" state interest, since the very issue was what sorts of interests the State had to be serving in protecting residents. But, since the court ruled that the pursuit of proper therapeutic goals was a "substantial" interest, it is reasonable to assume that reasonable efforts to protect what the court found to be "fundamental" liberty interests in personal security would also be deemed "substantial" by the court of appeals.

[39]Respondent requested the district court to instruct the jury that petitioners could be held liable if, knowing of the pattern of attacks he suffered, they failed to take reasonable steps to protect him. (Pet. App. 93a.) The district court gave that instruction (A. 73a-75a), but then negated it by also telling the jury that "to prove his case the plaintiff must show acts or omissions sufficiently harmful to evidence a deliberate indifference to the serious medical needs of the resident," that "you are not to decide whether Nicholas could have been treated in some * * * better way," and that "[t]he mere fact that Nicholas was injured on one or more occasions does not permit you to draw the inference that the injury or injuries was caused by any of the defendants or that any of the defendants was deliberately indifferent." (A. 74a-75a.) The court of appeals held that the "deliberate indifference" instruction was grounds for reversal (Pet. App. 24a-25a; 55a-58a) along with the district court's erroneous exclusion of respondent's expert testimony.

We and the court of appeals part company with petitioners on one issue, however. Petitioners say that one state interest, the reasonable pursuit of which may constitute a defense, is the "efficient and economical operation of the institution." (Pet. Br. 19.) The court of appeals disagreed: it ruled that "overcrowded conditions or inadequate staffing patterns may not justify the injuries." (Pet. App. 46a.) Put differently, the court of appeals ruled that, at least where physical safety is at stake, the "efficient and economical operation of the institution" was not a "substantial" state interest.[40]

On the facts of this case petitioners are not entitled to raise, and the Court need not decide, the question whether state budgetary concerns can ever justify toleration of unconstitutional institutional conditions. That is because petitioners made no such claim in either court below. Rather, they testified at trial that their resources and staffing were fully adequate. (Tr. 6-21, 6-135-36, 5-173.) They did not request any instruction from the district court that the jury should take efficiency or economy into account. Indeed, when respondent moved to compel production of documents such as budgets or budget requests, petitioners successfully resisted on the ground that those documents were "not even remotely related to this lawsuit."[41] And in the court of appeals petitioners made no mention of

[40]By contrast, as to claims regarding a denial of minimally adequate habilitation, the court of appeals ruled that fiscal constraints could be taken into account. (Pet. App. 38a, 47a.)

[41]See note 10, *supra*. Their position at trial explains why, as petitioners point out, "there is no evidence that [petitioners] had any control over the amount of money available to provide services at Pennhurst." (Pet. Br. 22.)

budgetary or efficiency concerns. In short, whether petitioners could defend their conduct on the ground that it was reasonably related to the "efficient and economical operation of the institution" was no part of this case in either the district court or the court of appeals, and therefore presents a question that this Court need not and should not decide.

If the Court does reach the issue, however, it should reject petitioners' view. At stake is the "historic liberty interest" in personal, bodily security (*Ingraham v. Wright*, 430 U.S. at 673), a fundamental liberty interest that at some point becomes an interest in life itself.[42] Serious intrusions on that interest, such as occurred in this case, ought to require explanations going beyond the State's interest in its pocketbook. "Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations * * *." *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968) (Blackmun, J.). The State should not be privileged to confine retarded persons under long-term life-threatening conditions and then defend its action on the ground that it hasn't the money to protect fundamental consitutional rights.[43]

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[42]See *Wyatt v. Aderholt*, 503 F.2d 1305, 1311 & n.6 (5th Cir. 1974) (describing the circumstances under which four residents of a state mental facility died "due to understaffing, lack of supervision, and brutality").

[43]Cf. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972): "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." (Footnote omitted.)

Finally, we note that the concurrence below erred in suggesting (Pet. App. 51a) that the majority opinion imposed on the jury the task of determining what is a "substantial" interest under the Constitution. Rather, the majority clearly recognized that that determination poses a legal question for the courts. The jury's task, then, is not to identify the sorts of interests (whether called "substantial" or "legitimate") that the State may assert, but to determine whether the defendant's conduct was in fact reasonably related to serving the interests identified by the district court as germane, or was an "exaggerated" response (*Bell v. Wolfish*, 441 U.S. at 548, 551, 555, 561-62) or was simply not related to those interests at all.[44]

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[44]The concurring court of appeals judges would instruct the jury that the respondent can prevail on his claim regarding protection from harm only if he can show that petitioners' actions amounted to "such a substantial departure from accepted professional judgement * * * as to demonstrate that [petitioners] did not base their conduct on a professional judgment * * * but rather that the choice in quesiton was * * * a sham." (Pet. App. 59a.) That standard is essentially the same as the Eighth Amendment "deliberate indifference" standard, for the elements of proof under both would be the same. The concurring judges thought such a standard necessary to keep out medical malpractice actions too inconsequential for the Constitution to notice. We have already shown, however, that the Eighth Amendment standard is inadequate in this case, and that this is not a dressed-up state tort action, any more than was *Bell v. Wolfish* or the numerous challenges to prison conditions heard by the federal courts under the Eighth Amendment. (Moreover, the petitioners are not doctors and could not be sued upon a claim of medical malpractice.) There is no other justification offered by the concurrence for imposing so high a hurdle to relief in this case, and it is inconsistent with the concurrence's recognition that the State has "an affirmative obligation to discover the needs of mentally retarded patients for protection and to respond to those needs in an adequate manner." (Pet. App. 56a, 59a.)

**B. Freedom From Unnecessary Custodial Shackling.**

1. The Eighth Amendment "deliberate indifference to serious medical needs" standard is inappropriate to claims of unnecessary shackling both for the reasons stated above going to the differences between convicted prisoners and retarded persons and for the additional reason that a standard designed to test whether sufficient attention has been paid to "serious medical needs" has nothing to do with the question whether unnecessary, purely custodial shackling of a resident violates his liberty interest in freedom from bodily restraint.

2. The court of appeals held that the district court on remand should instruct the jury that respondent could prevail unless the shackling to which he was subjected "was essential to protect the [respondent] or to treat him." (Pet. App. 18a.) That standard, as the court of appeals noted, requires that shackling be the "least restrictive alternative" available.[45] Petitioners, the *amici* States, and the American Psychiatric Association devote substantial portions of their briefs to arguing that the "least restrictive alternative" standard is not suitable to judge claims regarding shackling because shackling has justifiable uses as part of proper habilitation programs. That issue is not presented in this case. Petitioners do not contend that their prolonged shackling of respondent was part of any treatment program: on the contrary, their evidence showed that the purpose of the shackling was purely custodial. (See page 4, *supra*.)

At least in cases (like this one) involving purely custodial shackling for many hours each day for many months on end,

[45]If less restrictive alternatives are effective then shackles are not "essential" or "necessary."

we believe that a "necessary" or "compelling" test is appropriate.[46] The right to be free of unnecessary bodily restraints lies at the core of the fundamental liberty interest protected by the Due Process Clause. In many cases involving intrusions on rights that the Court has deemed fundamental—but that, in our view, weigh less heavily in the scales than the paramount right to be free from unnecessary bodily restraints[47]—the Court has required the State to show "compelling" or at least "important" reasons for the intrusion.[48]

[46]In *Bell v. Wolfish, supra,* the Court disapproved the "compelling necessity" test adopted by the Second Circuit because "the detainee's desire to be free from discomfort * * * simply does not rise to the level of those fundamental liberty interests delineated in cases such as" *Roe v. Wade,* 410 U.S. 113 (1973); *Stanley v. Illinois, supra;* and *Griswold v. Connecticut,* 381 U.S. 479 (1965) (among others). 441 U.S. at 534-535. The interest in freedom from unnecessary bodily restraints asserted in this case cannot reasonably be compared to a "desire to be free from discomfort"; it is, if anything, more fundamental than the rights recognized in the decisions cited as inapposite in *Bell.*

[47]The Due Process Clause protects a variety of interests; some are more important than others. See *Griswold v. Connecticut,* 381 U.S. 479, 502-503 (1965) (White, J., concurring); *Poe v. Ullman,* 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal of appeal).

[48]*E.g., Zablocki v. Redhail,* 434 U.S. 374, 388 (1978) (interference with fundamental right to marry must be justified by "important" state interests); *Procunier v. Martinez, supra,* 416 U.S. at 413 (censorship of prison mail must be justified by an "important or substantial governmental interest"); *Roe v. Wade, supra,* 410 U.S. at 155, 162-163 (interference with woman's right to terminate pregnancy requires "compelling" reasons); *Stanley v. Illinois, supra,* 405 U.S. at 651 (state must have a "powerful countervailing interest" to interfere with unmarried father's right to custody of children); *Kramer v. Union Free School District No. 15,* 395 U.S. 621, 627 (1969) (restrictions on resident's right to vote must promote a "compelling" state interest); *Shapiro v. Thompson,* 394 U.S. 618, 634, 638 (1969) (only "compelling" state interests can interfere with fundamental right to travel); *Griswold v.*

*(continued)*

In the circumstances of this case there is no force to the view of petitioners and some *amici* that requiring the State to show that that shackling was "essential" or "necessary" will impermissibly intrude on professional decisionmaking. The "necessary" standard for purely custodial shackling is the one employed by professionals in the field, as respondent's expert testimony would have shown. (Pet. App. 99a.) It is the one endorsed by the *amici* American Orthopsychiatric Association *et al.*, whose members will have to meet it. (Br. 24.) It is the one required by federal regulations under the Social Security Act.[49] And it is, in fact, the one mandated by Pennsylvania law and, *as both petitioners*

*(footnote continued from preceding page)*

*Connecticut, supra*, 381 U.S. at 485 (regulation of marital privacy rights regarding contraception cannot "sweep unnecessarily broadly"); *Stanley v. Georgia*, 394 U.S. 557, 568 & n.11 (1969) (private possession of pornography is part of "the individual's right to read or observe what he pleases" which is "fundamental" and cannot be overriden except for "compelling" reasons); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (intrusion on basic liberty to procreate invokes "strict scrutiny" test); cf. *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) ("the usual judicial deference to the legislature is inappropriate" when the government seeks to regulate the family); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (gender-based distinction requires "important" governmental objectives).

[49]Petitioners attempt to distinguish the necessity standard from that employed by federal regulations applicable to the use of restraints at Pennhurst. (Pet. Br. 28 n.38.) In fact, 42 C.F.R. 442.438 (1980) provides in relevant part (emphasis added):

> "(a) Except as provided for behavior modification programs in §442.422, the [facility] may allow the use of physical restraint on a resident *only if absolutely necessary* to protect the resident from injuring himself or others.
>
> (b) The [facility] may not use physical restraint—
>
> (1) As punishment;
>
> (2) For the convenience of the staff; or
>
> (3) As a substitute for activities or treatment."

*Youngberg and Matthews testified,* purportedly observed at Pennhurst. (Tr. 6-73, 6-86.)[50]

In short, at least in cases like this one, where (a) there is no claim that the use of shackles was part of any program of treatment, and (b) respondent was simply tied up for most of his waking hours for over a year, the Constitution requires a showing of necessity. That standard will not impede reasonable institutional administration, for it is not an undue interference with official discretion for the courts to inquire whether professional standards having the force of law have been met.[51]

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[50]Petitioners would distinguish the "necessary" standard from the requirements of the Pennsylvania statute. (Pet. Br. at 28 n.39.) But §4422 of the 1966 Act provides (emphasis added):

> "Mechanical restraints shall not be used or applied to a mentally disabled person, except:
>
> (1)When *necessary* to prevent such person from harming himself or others when being transported as provided in sections 405 or 421, * * * or
>
> (2) Whenever the director of a facility or his designee determine that such are *required* by the medical needs of such person admitted or committed, in which case the same may be used or applied only in accordance with regulations of the department."

In *In re Schmidt, supra,* the Pennsylvania Supreme Court held that the 1966 Act had adopted the principle of "normalization" and that "[c]onsistent with this concept is the requirement that the least restriction consistent with adequate treatment and required care shall be employed." 429 A.2d at 636.

[51]Here again we note that the jury will not be called upon to determine what are "compelling" state interests. Rather, it will determine whether the purely custodial shackling at issue was necessary for the State to serve its goals of providing care and habilitation in a setting of institutional order.

**C. Minimally Adequate Habilitation.**

The court of appeals ruled that respondent on remand is entitled to an instruction that the petitioners might be held liable if they had denied him habilitation that is "acceptable for him in light of present medical or other scientific knowledge." (Pet. App. 38a.) We believe that standard to be correct. So do the professional associations of psychiatrists and psychologists appearing as *amici*.[52] It is, moreover, no different in substance than the standard generally adopted by petitioners for gauging the lawfulness of state action, *i.e.*, that it be reasonably related to legitimate state interests. (Pet. Br. 33.) The State can have no legitimate interest in providing a retarded person habilitation that is not minimally acceptable.[53]

Petitioners, the *amici* States, and the American Psychiatric Association challenge the wisdom of the court of appeals' statement that treatment involving grave physical intrusions such as prefrontal lobotomies may require a "least restrictive alternative" standard. It is important that the Court understand that that issue is not presented in this

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[52]The American Orthopsychiatric Association *et al.* state that residents are entitled to habilitation that is "adequate in light of current professional knowledge." (Br. 3.)

The American Psychiatric Association states that residents are entitled to "adequate habilitation" (Br. 4-10) and that conduct falling below "acceptable standards" would infringe that constitutional right (*id.* 23).

[53]Petitioners mischaracterize our position in stating that we contend for a right to habilitation that will "maximize [respondent's] developmental potential." (Pet. Br. 8; see also *id.* at 11, 12 n.10.) Our position is that minimally, not maximally, adequate habilitation is required.

case.[54] No such intrusions are involved here. The court of appeals' remarks on the issue were wholly *dicta.* The court of appeals ruled that respondent was *not* entitled to a "least restrictive alternative" instruction in connection with his claim that he had not received minimally adequate habilitation. In the circumstances of this case we do not contest that ruling.[55] We seek instead to support the court of appeals' ruling that on the facts of this case respondent is entitled to a "minimally acceptable" instruction. Whether and under what circumstances, if any, a "least restrictive alternative" instruction might be warranted in connection with a claim regarding treatment poses, in this case, only an "abstract proposition[] of law," *Upjohn Co. v. United States,* 49

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[54]Thus *Sanchez v. New Mexico,* 396 U.S. 276 (1970), *dismissing for want of a substantial federal question* 80 N.M. 438, 457 P.2d 370 (1969), cited in the briefs of petitioners (p. 23, 26), the *amici* States (p. 25), and the *amicus* American Psychiatric Association (p. 17 & n.18), is irrelevant. *Sanchez* at most decided that a mentally ill person found to be dangerous to himself was not deprived of due process when not treated in a less restrictive setting than total institutionalization. Here no right to the least restrictive treatment—much less a right to the least restrictive placement—is at issue. In any event, summary dispositions such as *Sanchez* have considerably less weight than decisions reached after plenary consideration. *Caban v. Mohammed,* 441 U.S. 380, 390 n.9 (1979); *Illinois Election Bd. v. Socialist Workers Party,* 440 U.S. 173, 180-81 (1979); *Edelman v. Jordan,* 415 U.S. 651, 671 (1974).

[55]Thus respondent does not contend that (and the case does not present the question whether) "the provision of acceptable medical treatment within an institution may nonetheless violate the liberty interests of its residents." (Brief of American Psychiatric Association as *Amicus* 23.)

U.S.L.W. at 4093, *supra* n.11, that this Court need not and should not address.[56]

## IV.

## RESPONDENT'S EXCLUDED EVIDENCE WAS RELEVANT.

The district court excluded respondent's expert testimony on the ground that it was evidence only of malpractice. All nine judges on the court of appeals agreed that that was error: it does not follow that because an item of evidence could be relevant to a malpractice claim it is therefore irrelevant to a constitutional claim. We show below that the excluded testimony was relevant even if respondent's claims are to be judged under the Eighth Amendment "deliberate indifference" standard. *A fortiorari,* it was relevant under the Due Process Clause standards for which we have contended. Under any standard, then, the evidence was wrongly excluded and a new trial is required.[57]

[56]Nor is there any force to the view of the concurrence below that the standard for which we contend (and which is endorsed by all the *amici* professional associations) gives simple malpractice claims constitutional status. The *de minimis* principle stated in *Ingraham v. Wright* and *Bell v. Wolfish* is sufficient to bar trivial claims from the federal courts. Moreover, even *Estelle v. Gamble* recognized that prisoner complaints regarding treatment could rise to constitutional claims even if they would also be actionable under state tort law. The higher, "deliberate indifference" standard adopted in that case reflected the prison context in which the claim arose and, for the reasons stated earlier (see pages 29-30, *supra*) is insufficient in this case, where respondent was committed for the very purpose of receiving treatment.

[57]The question is not whether the proferred evidence would by itself necessarily have proved respondent's case, but whether that evidence had "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401.

### A. The Evidence Was Relevant to Respondent's Protection From Harm Claim.

The record showed a prolonged and repeated pattern of injuries to respondent of which petitioners concededly were aware. Petitioners themselves testified that there was adequate staffing to provide proper supervision on the wards. Respondent's expert testimony would have shown, however, that his injuries were the direct result of inadequate supervision and the lack of programs and activities on his ward. (Pet. App. 98a.) The expert would have further testified about numerous proven programs that reduce aggressive behavior of retarded persons and that those programs were available at Pennhurst yet were not used by petitioners. (*Id.*) In the context of the other evidence of record, that testimony would have tended to show that petitioners' failure to provide such supervision and programming reflected a "deliberate indifference" to respondent's physical safety.[58]

The evidence was also relevant under any applicable due process standard. Assuming the applicability of the standard proposed by the concurrence below, the evidence would have tended to show that petitioners' conduct was so

[58]Cf. *Layne v. Vinzant*, No. 80-1152, slip op. at 4 (1st Cir. July 31, 1981) (even under the Eighth Amendment standard, "[w]hen a supervisory official is placed on actual notice of a prisoner's need for physical protection or medical care, 'administrative negligence can rise to the level of deliberate indifference to or reckless disregard for that prisoner's safety' ") (citations omitted); *Murphy v. United States*, No. 78-0251, slip op. at 14 (D.C. Cir. May 18, 1981) (under Eighth Amendment standard of deliberate indifference the requisite malice "can be inferred from evidence that assaults are sufficiently pervasive to reasonably apprise prison officials of the need for protective measures" even where there is no direct evidence of willful or deliberate violations of the officials' duty of protection).

substantial a departure from accepted professional judgment and standards that the conduct could not be said to have been based on a professional judgment at all. The evidence also would have tended to establish that the conditions that led to respondent's injuries were not reasonably related to any state interest in providing decent care and reasonable safety (which petitioners concede they are under a duty to provide) or in providing habilitation. For example, the testimony would have shown that the means for preventing injury were readily available and would not have interfered with any state interest in promoting the social interaction or individual independence of the residents, and the jury could have inferred from that testimony that petitioners' toleration of the conditions leading to the physical abuse shown on this record therefore represented an exaggerated and illegitimate response to that interest, if indeed it was related to it at all.[59]

Thus, the proffered evidence was relevant under any standard that might reasonably be applied to respondent's claims. Accordingly, the evidence was improperly excluded and the court of appeals was correct in ordering a new trial at which that evidence will be received.

### B. The Evidence Was Relevant to Respondent's Shackling Claim.

Respondent's expert testimony would have shown that he was shackled for excessive periods and that the shackles were imposed, not for any medical or habilitation purpose

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[59]Evidence tending to show that petitioners' actions were not reasonably related to a legitimate state interest would also be admissible under the standards of *Bell v. Wolfish*. See pp. 12-13, *supra*.

(which petitioners conceded), but solely for the convenience of the staff. (Pet. App. 101a.) It would further have shown that the excessive shackling actually caused a deterioration in self-help skills and an increase in aggressive behavior.[60]

That proffered testimony went directly to the question whether petitioners' use of shackles violated respondent's constitutional rights however they are defined.[61] It would have tended to show that the petitioners' continuing and knowing actions caused respondent harm and manifested everything from "deliberate indifference" to conduct not reasonably related to any legitimate state interest. It was accordingly relevant under any standard and should have been admitted.

### C. The Evidence Was Relevant to Respondent's Habilitation Claim.

Respondent sought to adduce expert testimony showing that he has the potential to learn (and thus retain) increased basic skills; that petitioners had denied him suitable habilitation programs that were available at Pennhurst; that the habilitation program that they did use was not minimally adequate because it was not administered according to professional standards; and that as a result of the denial of minimally adequate habilitation respondent's self-help skills had deteriorated during his institutionalization. (Pet. App. 99a-104a.)

[60]See *Halderman, supra,* 446 F. Supp. at 1306-07 (restraints in lieu of habilitation are used at Pennhurst on a routine basis simply to control patients).

[61]Petitioners argue that the district court judgment should be reinstated because there is no evidence of improper use of restraints. (Pet. Br. 33-34.) There is no such evidence only because it was improperly excluded.

The jury could have inferred from this testimony that the persistent failure to provide minimally acceptable habilitation—habilitation that was available and the denial of which caused such harm to respondent—bespoke a deliberate indifference to respondent's needs. It could therefore also have inferred that petitioners' denial of minimally adequate habilitation was not reasonably related to any legitimate state interest in providing care or institutional order. The evidence was therefore relevant under any applicable standard and was improperly excluded.

## V.

## PETITIONERS ARE NOT ENTITLED TO IMMUNITY AS A MATTER OF LAW.

Petitioners argue that this Court should grant them immunity as a matter of law[62] because there is no evidence of subjective bad faith in the record sufficient to avoid the immunity defense under the formula of *Wood v. Strickland*, 420 U.S. 308 (1975). (Pet. Br. 35.) If there is no such

[62]It is doubtful that petitioners raised the issue of qualified immunity as such in the court of appeals. Chief Judge Seitz thought they had not. (Pet. App. 48a n.1: "The existence of a qualified immunity defense is not raised on this appeal.") In any event, petitioners surely raised no issue of immunity required as a matter of law, and the court of appeals' *sua sponte* discussion of the possible applicability of a qualified immunity defense on retrial (Pet. App. 43a-44a) did not address that issue. The question is therefore not properly before the Court and need not be decided. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 49 U.S.L.W. 4516, 4519 (1981) ("We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed ***."); *Delta Air Lines, Inc. v. August*, 49 U.S.L.W. 4241, 4245 (1981) (*semble*).

evidence, however, that is only because it was improperly excluded at trial. The evidence proffered in the district court would have tended to prove that there was no permissible justification for the denial of minimally adequate habilitation or for the restraints used, and that petitioners' actions caused respondent's physical and psychological injuries. Particularly when combined with the evidence of record showing a continuous and persistent pattern of injury, unnecesary custodial shackling, and lack of minimally adequate habilitation, that additional evidence would easily support an inference of bad faith or malice.[63]

Thus *Procunier v. Navarette*, 434 U.S. 555 (1978), relied on by petitioners, is inapposite. There the Court held that immunity was warranted because the First Amendment rights at issue had not been clearly established when the officials acted (*id.* 565) and because an allegation of negligence could not implicate a malicious intent to harm. *Id.* 566. Here respondent has specifically alleged malice and intent to harm (Pet. App. 90a-91a),[64] and sought to adduce evidence that would have supported such allegations.[65]

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[63]See cases cited n.58, *supra*.

[64]Respondent's complaint (filed before *Bell v. Wolfish* came down) also alleged Eighth Amendment violations—*i.e.*, "wanton infliction of pain" *Gregg v. Georgia*, *supra*, or "deliberate indifference," *Estelle v. Gamble*, *supra*, which if proved would defeat a good faith immunity. (Pet. App. 90a.)

[65]Moreover, while *O'Connor v. Donaldson*, *supra*, established a qualified immunity that could be applicable to petitioner Youngberg, that decision by its terms would not reach lower level administrators like petitioners Conley and Matthews. Even if qualified immunity exists as to them, its scope might vary with their varying levels of discretion. *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974). Since "the burden is on the official claiming immunity to demonstrate his entitlement" to it, *Dennis v. Sparks*, 49 U.S.L.W. 4001, 4002 (1980), the incomplete record on this point is further ground for deferring decision.

*Navarette* is also distinguishable with regard to the objective prong of the good faith defense, for petitioners concede that respondent had a right to decent care. The state statute under which respondent was committed created such an entitlement, and even in the prison context it has long been clear that officials must maintain reasonable conditions consistent with fundamental decency. (See pp. 12-13, *supra.*) Petitioners could not have reasonably believed they owed respondent a lesser duty. Nor could they have reasonably believed that unjustified exposure to the pattern and degree of injury shown on this record or unjustified shackling of the magnitude shown here would not violate that constitutional duty. Respondent's evidence, had it been admitted, would have shown the exposure to injuries and shackling to have been unreasonable and unjustified by any legitimate medical or administrative consideration. Simply because of the established and conceded right to decent care, then, petitioners are not entitled to immunity as a matter of law.

Moreover, apart from the right to decent care, prisoner cases had established a right to reasonably safe conditions and reasonable protection from harm well before the times relevant here, *e.g., Woodhous v. Virginia,* 487 F.2d 889 (4th Cir. 1973); *Holt v. Sarver,* 302 F. Supp. 362 (E.D. Ark. 1970), *aff'd,* 442 F.2d 304 (8th Cir. 1971), *aff'd sub nom. Hutto v. Finney, supra; Roberts v. Williams,* 302 F. Supp. 972 (N.D. Miss. 1969), *aff'd in relevant part, remanded in part,* 456 F.2d 819 (5th Cir. 1971), and the federal courts had established similar obligations for state officials responsible for operating institutions for retarded or mentally ill persons, *e.g., Welsch v. Likins,* 373 F. Supp. 487 (D. Minn. 1974), *aff'd in relevant part, vacated and remanded in part,* 550 F.2d 1122 (8th Cir. 1977); *New*

*York State Ass'n for Retarded Children, Inc. v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973). Beyond that, the Pennsylvania statute had created an entitlement to habilitation upon its enactment in 1966, and by 1976 the federal courts were consistently upholding, on constitutional grounds, *at least* a right to minimally adequate habilitation. *E.g., Wyatt v. Aderholt*, 503 F. 2d 1305 (5th Cir. 1974); *Donaldson v. O'Connor*, 493 F. 2d 507 (5th Cir. 1974), *vacated*, 422 U.S. 563 (1975); *Saville v. Treadway*, 404 F. Supp. 480 (M.D. Tenn. 1974) (three-judge court), *consent agreement approved*, 404 F. Supp. 483; *Welsch v. Likins*, *supra*; *see Nelson v. Heyne*, 491 F. 2d 352 (7th Cir. 1974); *Davis v. Watkins*, 384 F. Supp. 1196 (N.D. Ohio 1974); *compare New York State Ass'n for Retarded Children, Inc. v. Rockefeller*, *supra*, *with New York State Ass'n for Retarded Children, Inc. v. Carey*, 393 F. Supp. 715, 719 (E.D.N.Y. 1975). In these circumstances there is no substance to petitioners' claim that they are entitled to immunity as a matter of law.

Nor is this an appropriate case for the Court to entertain the suggestion made by *amicus* American Psychiatric Association (Br. 24-26) that a new form of immunity under § 1983 should be judicially created for state officials who in good faith seek to comply with constitutional standards but are thwarted by inadequate state funding. Petitioners did not contend in the trial below that their actions were in any way influenced by financial constraints; rather, they testified that staffing was wholly adequate. Furthermore, the evidence proffered by respondent would have shown that the programs necessary for his minimally adequate care and habilitation were available at Pennhurst. On this record, which would indeed support a finding of affirmative bad faith, consideration of the American Psychiatric Association's suggestion would be premature.

In any event, the American Psychiatric Association stands alone among the professional organizations appearing as *amici* in contending for an expanded immunity. The American Orthopsychiatric Association *et al.* take a contrary view. They essentially recognize (Br. 29-30) that, since states themselves are not subject to suit for damages, see *Edelman v. Jordan,* 415 U.S. 651 (1974), the creation of expanded forms of official immunity would both restrict the remedies of those persons §1983 was designed to protect and impede the deterrent purpose the statute is supposed to serve. *E.g., Robertson v. Wegmann,* 436 U.S. 584, 590-91 (1978). Moreover, the ones in charge of running state institutions are probably in the best position to seek adequate funding to keep those institutions from denying constitutional rights: so viewed, the concern (raised by petitioners, the American Psychiatric Association, and the *amici* States) that professionals will refuse to work in unconstitutional institutions could have a more positive influence on the legislature than a negative impact on the institutionalized.[46] Accordingly, if the Court does reach the American Psychiatric Association's suggestion, it should reject it.

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[46]That concern is, in any event, unrealistic in this case, for two reasons. First, if petitioners are correct in stating that there are already adequate state remedies in this case (but see note 35, *supra*), there is no reason to believe that the existence of federal remedies will drive professionals, content to work under the threat of state-imposed liability for constitutional wrongs, from their jobs. Second, petitioners' entire argument on the issue is makeweight, since Pennsylvania provides for indemnification of its officials against damages in §1983 cases. 4 Pa. Code §§39.2-.3. The Pennsylvania Attorney General's representation of petitioners means that they will in fact be indemnified against any judgment in this case. *Id.*

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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